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No. 977

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

DELORES WATKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

NORMAN S. ROSEN
77 West Washington Street
Chicago, Illinois 60602

RICHARD E. GORMAN
One North LaSalle Street
Chicago, Illinois 60602
Attorneys for Petitioner.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Delores Watkins, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 28, 1964 and is not reported.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed November 18, 1966 and is included in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

This Court on motion of the petitioner extended the time for the filing of this petition to January 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it not error of a prejudicial reversible quantum for the Trial Court to permit prejudicial hearsay testimony by a Government agent to go into evidence before the jury and not harmless error as held by the Appeals Court in its opinion?

2. Was it not reversible error for the Court of Appeals to hold, as did the Trial Court, that the search of an apartment and seizure of evidence by federal agents without an arrest or search warrant being in existence under the facts of this case was permissible?

STATEMENT OF THE CASE.

Your petitioner was charged with violations of Section 174, Title 21, United States Code. The indictment consisting of four counts was returned April 2, 1964 and charged a co-defendant, Lulu Jackson, in Count One with the possession of a quantity of narcotic drugs in Chicago, Illinois on March 26, 1964. Count Two charged your petitioner with possession of a quantity of a narcotic drug on the same day also in Chicago. Count Three charged both defendants with the possession of a narcotic

drug on the same date. Count Four charged Lulu Jackson with the possession of a narcotic drug. All counts were identical with the exception of the quantity of the narcotic drug involved. The case was tried to a jury which returned a verdict of guilty as to both defendants on all counts on December 4, 1964.

Motions to suppress evidence seized from an apartment at 6814 Dorchester Avenue, Chicago, Illinois at the time of the arrest of the petitioner were filed September 18, 1964, and were taken under advisement by the Court to be heard with the case, by order of October 1, 1964. This motion was denied when the motion for new trial was denied.

United States Narcotic Agent Patch testified that he was at the apartment of Carvelle Johnson, an informer, on March 26, 1964 and that while there he monitored a telephone call made by Johnson (Tr. 71, 72). He further testified, over objection, to a conversation with Johnson, purportedly to establish that he had consent to listen in on the telephone call, that Lulu Jackson was Johnson's source of supply for narcotics (Tr. 77). Patch was then permitted to testify to an alleged conversation between Johnson and the defendant Jackson, whose voice he had never heard at the time (Tr. 110), purportedly arranging a narcotic sale (Tr. 78). Agent Patch then testified again, over objection, to monitoring a telephone call purportedly received from Jackson by Johnson. Agent Patch then testified to proceeding to the rear door of an apartment at 6814 Dorchester Avenue and to peering through the glass window for a second or two (Tr. 122) and observing the two defendants at a table in the dining room of the apartment with various items on the table which were later identified as Government exhibits.

Agent Patch described rushing into the apartment after Watkins opened the door in response to a knock by informers Johnson and Evans (Tr. 89). The apartment was searched and the narcotics described in Counts Two, Three and Four of the indictment were found. Agent Patch also testified that informer Johnson was a drug addict (Tr. 111) and that the informers Johnson and Evans were permitted to drive off after entry to the apartment had been gained (Tr. 131).

Agent Connolly testified to picking up a package purportedly dropped by Jackson in the areaway at the rear of 6814 Dorchester and field testing the same before entrance to the apartment with a Marquis Reagent. The contents of this package were later identified as the narcotics that were the subject matter of Count One of the indictment. Agent Connolly and Policewoman Maurovich testified to recovering the narcotics which were identified as the subject matter of Count Four from Lulu Jackson.

Jackson testified in her own behalf and denied receiving a phone call from informer Johnson (Tr. 312). She testified she was at the apartment at 6814 Dorchester at the invitation of her sister whom she described as an addict (Tr. 315). Jackson denied placing a package in the areaway at the rear of 6814 Dorchester (Tr. 315). She also testified that the shade was down on the back door window and that the curtains were drawn. She testified Watkins came to the apartment at her request (Tr. 324).

Your petitioner Watkins also testified in her own behalf and denied any possession of narcotics, that she unlocked the back door in response to a knock and that five men rushed in (Tr. 361). Watkins testified the shade

on the back door was down and the curains drawn (Tr. 361).

The motion to suppress evidence seized at 6814 Dorchester was never directly ruled on but was denied as a part of the Motion for a New Trial. The case was taken by the Court of Appeals on the typewritten record which is being certified to this Court.

STATUTES CONCERNED.

Section 174, Title 21, U.S.C.

Rule 41, Federal Rules of Criminal Procedure.

REASONS FOR GRANTING WRIT.

1. The Court of Appeals has departed far from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court so as to call for an exercise of this Court's power of supervision.

2. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court.

3. The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeal.

The Court of Appeals in its opinion agrees that the hearsay testimony was improper to be brought before the jury but states that because, in its opinion, the weight of the evidence was overwhelming that the error was harmless within the purview of Rule 52(a) of the Federal Rules of Criminal Procedure. Nothing could be further from the fact.

Under the guise of establishing the informer Johnson's permission to Agent Patch to monitor a telephone call he allegedly made to the defendant Jackson, Patch tes-

tified, over objection (Tr. 77), that Johnson told him that Lulu Jackson was his source of supply for narcotics. This testimony coming at the very outset of the trial and from a Narcotic Agent was extremely prejudicial to your petitioner.

The informer Johnson was not called by the Government to testify. This situation brings the circumstances squarely under the basis or reason for the hearsay rule. The rule excluding hearsay is based on the lack of opportunity to test by cross-examination the veracity and accuracy of the statement offered. The Seventh Circuit recognized this rule and set it out in its opinion in *Globe Indemnity Co.* v. *McAvoy Co.*, 41 F.2d 122, at page 125:

> "The witness Shaw, who has been a director of appellee corporation continuously since 1904, and who, with his associates, has been general counsel and attorney for appellee during all of that time, was permitted to testify, over appellant's objection, that Ortseifen told Shaw that 'he never mentioned anything about a contract which he proposed to enter into with the Italian American Vineyard Company with respect to the purchase of some wines in California until after suit had been started against the company when I went to him about it. He then said something as to whether it was a company contract or a personal contract. * * * He said it was a personal matter which he expected to take care of; he said the institution of this lawsuit and such liability, if any, as might be incurred, if any was incurred by the company, was a personal matter and he had signed the company's name.'
>
> "Ortseifen was not called as a witness by either side. Whether there was good reason for not doing so is not shown, nor is it material, for in either event it would clearly be a violation of the rule

against hearsay evidence, with no opportunity to appellant of cross-examination; and it was incompetent for the further reason that the statement was not made in the presence of appellant, and hence could not bind it. * * *"

This case was followed and the rule applicable was also discussed in *Superior Engraving Co.* v. *National Labor Rel. Bd.*, 183 F.2d 783 at page 794:

> "The rule excluding hearsay is a basic rather than a technical rule. The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having sufficient probative effect to raise an inference that the fact is as stated. 31 C.J.S., Evidence, §193, P. 924. Our conclusion that the excluded statements constituted hearsay is, we think fortified by *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 39 S.Ct. 38, 63 L.Ed. 123; *Bracken et al.* v. *Cato et al.*, 5 Cir., 54 F.2d 457; *Globe Indemnity Co.* v. *McAvoy Co.*, 7 Cir., 41 F.2d 122, certiorari denied 282 U.S. 884, 51 S.Ct. 87, 75 L.Ed. 780."

This testimony coming as it did from a narcotic agent, presumably trained to testify, set a pattern for the entire trial that prejudiced the petitioner in all subsequent events testified to.

After these conversations the agents accompanied by the informers Johnson and Evans made their way to an apartment described as being occupied by a sister of Jackson (Tr. 312) at 6814 South Dorchester, Chicago, Illinois. Agent Connolly testified to observing Jackson place a package in the areaway at the rear of this address. The contents of the package were field tested and then Agent Patch went to the rear door of a first

floor apartment and testified as to what he saw (Tr. 87) in one or two seconds of observation (Tr. 122).

The agents then followed the informers Johnson and Evans to the rear door of the apartment and when the door was opened, in response to a knock by the informers, by Watkins, the agents rushed in (Tr. 89) and seized the material which is the subject matter of Counts Two, Three and Four of the indictment. The agents had neither a search warrant or an arrest warrant, nor was one in existence (Tr. 5). The agents did not announce their presence or demand entrance before forcing their way into the apartment after the informers (Tr. 89). The Court's attention is directed to defense Exhibits A, E, G, F, and H, photographs in evidence of the apartment and the surroundings.

Your petitioner was a person aggrieved by this unlawful search, *Rule 41, Rules of Criminal Procedure.* As such, her rights under the Fourth Amendment to the Constitution were violated by this unwarranted violation of privacy. The circumstances of this case did not preclude the agents from presenting the facts in their possession to a judicial officer while keeping the apartment under surveillance. This procedure might then have made the use of Agent Patch's testimony to establish probable cause competent in such a hearing but this fact of the conversation with Johnson cannot justify the unwarranted entrance to the apartment at 6814 Dorchester.

In support of this position are the cases of *McDonald* v. *United States,* 335 U.S. 451, *Miller* v. *United States,* 357 U.S. 301, and *Jones* v. *United States,* 357 U.S. 493.

The Court of Appeals in its opinion sanctions an error by the Trial Court that the Government prosecutor anticipated in the pretrial hearing on the motion to suppress (Tr. 67) when he warned the Trial Court that some evidence to be adduced in this hearing would be prejudicial to the defendants. The Trial Court, however, undertook to protect the defendants by stating he would hear that evidence out of the presence of the jury (Tr. 67). This the Trial Court failed to do and the Court of Appeals in its opinion compounds the error by calling this extremely vital and prejudicial evidence "harmless error."

The rulings by both Courts are erroneous and related to substantial rights of your petitioner. In *Bihn* v. *United States,* 328 U.S. 633, 638, this Court said:

> "Yet as stated in *McCandless* v. *United States,* 298 U.S. 342, 347-348, 'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.'"

Remove this testimony from the jury's mind and the Court of Appeals gratuitously assumes the evidence would still be overwhelming. Proper as this testimony may have been in the hearing to suppress evidence it should never have gone to the jury and the Court of Appeals in its opinion was in error in evaluating its effect on the minds of the jury. Your petitioner by this proceeding was deprived of her constiutional right to trial by jury.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NORMAN S. ROSEN
RICHARD E. GORMAN
Attorneys for Petitioner.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966 — SEPTEMBER SESSION, 1966

Nos. 15032 & 15033
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DELORES WATKINS and LULU JACKSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 18, 1966

Before DUFFY, *Senior Circuit Judge,* and CASTLE and FAIRCHILD, *Circuit Judges.*

CASTLE, *Circuit Judge.* The defendants-appellants prosecute these appeals from the respective judgment of conviction and sentence entered as to each following a jury trial under an indictment charging the unlawful receipt, concealment, and facilitation of the transportation and concealment of a narcotic drug, heroin, in violation of 21 U.S.C.A. § 174. The indictment was in four counts. Lulu Jackson was charged individually in Counts 1 and 4, jointly with Delores Watkins in Count 3, and Delores Watkins was charged individually in Count 2. Otherwise, except for the specific quantity of the narcotic drug designated in each count, the counts were identical. Lulu Jackson was con-

victed on the three counts in which she was charged and was sentenced to imprisonment for seven years on each count, the sentences to run concurrently with each other. Delores Watkins was convicted on the two counts in which she was charged and was sentenced to imprisonment for eleven years on each count, the sentences to run concurrently with each other and concurrently with the five year concurrent sentences imposed on each of the five counts on which she had been convicted under another indictment charging her with conspiracy and other narcotics violations.[1]

The defendants predicate the existence of error requiring reversal on the trial court's rulings denying the defendants' motions to suppress and admitting in evidence, over objection, the narcotic drugs seized at the time of the arrest of the defendants; and the admission, over objection, of hearsay testimony.

Defendants contend that the search and seizure, and the arrest, were illegal because made without an arrest warrant or a search warrant, and the narcotics seized were therefore inadmissible in evidence. In resolving the issues raised by these contentions we must view the evidence and the reasonable inferences which may be drawn therefrom in a light most favorable to the government. *United States* v. *Zimmerman,* 7 Cir., 326 F. 2d 1.

Appraisal of the record in the light of the above standard reveals testimony of government witnesses which is clearly sufficient to establish that the arrests were made on probable cause and with reasonable grounds, and that the contemporaneous search of the persons of the defendants, their belongings, and the immediate premises, was incident to a valid arrest and the seizures were reasonable. In this connection, the record discloses that prior to the arrest of the defendants and the accompanying search and seizure a government agent had monitored two telephone conversa-

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[1] *United States* v. *Chester Jones, Delores Watkins and Raymond Jones,* 7 Cir., ... F. 2d .... . (Nos. 14969-70-71, Opinion filed Nov. 16, 1966)

tions of an informer with defendant Lulu Jackson in which a purchase of narcotics was arranged. Another agent, who had the defendants under surveillance, followed them to the apartment at which the narcotic was to be picked up by the informant. This agent observed Lulu Jackson deposit a package in an areaway at the rear of the building. He picked up the package and made a field test of the contents. The test indicated the presence of heroin. When the first agent arrived with the informer-purchaser the package was turned over to the agent. At the rear-door of the apartment the agent observed the defendants through a glass panel in the door. They were seated at a table and pouring white powder through a strainer. Tinfoil and additional white powder were on the table. The informer knocked at the door. As it was opened the agents entered the apartment, identified themselves, and placed the defendants under arrest. The white powder found on the table with paraphernalia used to dilute and package narcotics was seized. It was heroin, and it constitutes the subject matter of Count 3 of the indictment. The heroin contained in the package retrieved from the rear of the building is the subject of Count 1, and additional quantities of heroin found in defendant Watkin's purse and on the person of defendant Jackson are the subjects of Counts 2 and 4.

The pre-arrangement for the sale and pick-up, together with the result of the field test of the drop made pursuant thereto, and the observation made through the panel of the door when the agent approached in the company of the purchaser-informer, amply supplied probable cause on which to effect the arrest of the defendants without a warrant, and the search and seizures were reasonable as incidental to a valid arrest. *Jennings* v. *United States,* D.C. Cir., 247 F. 2d 784, 785.

In detailing his conversation with the informer in which the latter consented to the agent's monitoring the telephone calls to defendant Jackson, the agent testified that the informer, an addict, referred to Jackson as his source of supply. It was improper that this factor be brought out

before the jury in this manner. But in view of the overwhelming evidence of the defendants' guilt the admission of the statement was harmless error within the purview of Rule 52(a) of the Federal Rules of Criminal Procedure. As aptly observed in *United States* v. *Press*, 2 Cir., 336 F. 2d 1003, 1013:

> "One of the main considerations in deciding if substantial prejudice exists because of the introduction of hearsay material is the strength of the Government's case independent of hearsay."

The judgment orders appealed from are affirmed.

AFFIRMED.